

FEDERAL CIRCUIT COURT OF AUSTRALIA

SIDHU v MINISTER FOR IMMIGRATION & ANOR

[2014] FCCA 167

Catchwords:

MIGRATION – Review of a decision of the Migration Review Tribunal – application for a Partner (Temporary) (Class UK) Subclass 820 visa or a Partner Residence (Class BS) Subclass 801 visa – no jurisdictional error – application dismissed – *ex tempore* judgment.

Legislation:

Migration Act 1958 (Cth), ss.362B, 379G, 426A

Migration Regulations 1994 (Cth), Sch.2, Part 820, cls.820.21, 820.211; Sch.3, cls.3001, 3003, 3004

Cases cited:

SZJQP v Minister for Immigration and Citizenship [2007] FCA 1613

Kaur v Minister for Immigration and Anor [2010] FMCA 822

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611

MZYPZ v Minister for Immigration and Citizenship [2012] FCA 478

Re Drake and Minister for Immigration and Ethnic Affairs (No.2) (1979) 2 ALD 634

Applicant:	KULWANT SINGH SIDHU
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	MLG 587 of 2013
Judgment of:	Judge Hartnett
Hearing date:	3 February 2014
Delivered at:	Melbourne
Delivered on:	3 February 2014

REPRESENTATION

The Applicant: In Person

Counsel for the Respondents: Mr McDermott

Solicitors for the Respondents: Australian Government Solicitor

THE COURT ORDERS THAT:

- (1) The name of the First Respondent be changed to ‘Minister for Immigration and Border Protection’.
- (2) The Application filed 1 May 2013 is dismissed.
- (3) The Applicant pay the costs of the First Respondent fixed in the sum of up to \$6,646.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 587 of 2013

KULWANT SINGH SIDHU

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(Edited *ex tempore* reasons)

1. The Applicant filed an Application in this Court on 1 May 2013 seeking judicial review of a decision of the Migration Review Tribunal ('the Tribunal') made 11 April 2013. The Tribunal affirmed a decision of a delegate of the First Respondent ('the delegate') made 11 November 2011 not to grant the Applicant either a Partner (Temporary) (Class UK) Subclass 820 visa or a Partner Residence (Class BS) Subclass 801 visa.
2. The ground of the Application filed 1 May 2013, wherein the Applicant sought an order quashing the decision of the Tribunal, is simply:-

"I am not satisfied with decision."

3. In an Affidavit filed 1 May 2013, the Applicant set out why he is aggrieved by the decision of the Tribunal and his evidence is as follows:-

"...

I am not satisfied with my decision made by Migration Review Tribunal. I want to review my application again because when I applied for partner visa. I got that time bridging visa so I applied onshore application because I had married that time and do not want to left my wife alone here and that time we were having not enough money to go off-shore and to buy the tickets. Moreover, her kids were studying in school and we were not wanting to stop their studies. At that time, we were renting and I was the only one earning money paying rent and bills. In that case, if I went overseas it was hard for my wife to manage all the expenses. She was not working at that time."

4. By Response filed 10 May 2013, the First Respondent sought that the Application be dismissed and that the Applicant pay the First Respondent's costs of the proceedings on the ground that the decision under review was not affected by a jurisdictional error.
5. On 3 July 2013, Registrar Caporale made Orders which included order 3 which provided that the Applicant file and serve any amended application giving proper particulars of the grounds of the application or further and better particulars of the application by 6 January 2014. The Applicant was also required by that date to file and serve written submissions. The Applicant complied with neither of these orders.
6. The First Respondent filed a Court Book on 3 December 2013 with contents which are evidence in the proceedings and further filed Contentions of Fact and Law on 17 January 2014. The Applicant, who appeared in person this day, confirmed that he had received the First Respondent's Contentions of Fact and Law filed 17 January 2014 and had read their contents.
7. Despite not having raised this ground in his Application filed 1 May 2013 or Affidavit filed 1 May 2013 in support of the Application, nor in any amended application or written contentions, neither of which have been filed, the Applicant made oral submissions at the hearing this day

that he had not received correspondence from the Tribunal which was forwarded to his authorised recipient. He claimed to have communicated with the Tribunal (and on two occasions) as to his change of contact details.

8. The Applicant lodged his application for review to the Tribunal on 1 December 2011. That Application was dated 30 November 2011. In that Application and under Section E, Appointment of Representative, the Applicant provided the name of John Kotsifas of JK Legal at 5/398 Lonsdale Street Melbourne, Victoria 3000 as his registered migration agent and lawyer and requested, in Section F of that Application for Review form, that the Tribunal send all correspondence in connection with the review to his representative whom he nominated as his authorised recipient.
9. Pursuant to s.379G of the *Migration Act 1958* (Cth) ('the Act'), the Tribunal is obligated to give to the authorised recipient, instead of the Applicant, any document that it would otherwise have given to the Applicant. Section 379G(2) of the Act provides that if the Tribunal gives a document to the authorised recipient, the Tribunal is taken to have given the document to the Applicant.
10. Section 379G(3) of the Act provides for the Applicant to vary or withdraw the notice given by him under s.379G(1)(b) of the Act at any time. But the Applicant, in this case, did not do so. What the Applicant did was send a change of contact details to the Tribunal dated 30 July 2012 and subsequently, 7 January 2013, notifying the Tribunal of a change in his contact details. In the first of such forms, the Applicant provided a new residential address of 2/27 Mossman Crescent Lalor Victoria 3075 and in the second of such forms, he provided a new residential address of 484/A South Road Moorabbin Victoria 3189. In neither of the change of contact details form, did the Applicant withdraw his previous authorisation of a person to receive correspondence on his behalf, or his previous authorisation of a person to act as his representative.
11. The Tribunal proceeded to do that which it was obligated to do. Namely to send all communication to the authorised recipient, Mr John Kotsifas of JK Legal in respect of the Applicant's application proceeding before the Tribunal.

12. In correspondence written to the Applicant by the Tribunal and forwarded to the authorised recipient, the Tribunal's letters of 6 December 2012 and 19 February 2013 each advised the Applicant that if he did not attend the Tribunal hearing and a postponement was not granted, the Tribunal may make a decision on his case without further notice.
13. The Tribunal wrote to the Applicant advising him that his hearing would take place on 10 April 2013. Such correspondence was sent, as was all the correspondence emanating from the Tribunal, to the Applicant's representative, a registered migration agent, in accordance with the Applicant's instructions as provided in his review application.
14. On the day of hearing, the Applicant did not appear before the Tribunal on the day and at the time and place at which he was scheduled to appear. No response was received by the Tribunal from the Applicant to the notice of hearing date.
15. Pursuant to s.362B of the Act, the Tribunal decided to make its decision on the review without taking any further action to enable the Applicant to appear before it. Section 362B(1) of the Act, is as follows:-

“(1) If the applicant:

(a) is invited under section 360 to appear before the Tribunal; and

(b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear;

the Tribunal may make a decision on the review without taking any further action to allow or enable the applicant to appear before it.

(2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review in order to enable the applicant's appearance before it as rescheduled.”

16. As was said in *Kaur v Minister for Immigration and Anor* [2010] FMCA 822 at paragraph 35 by Barnes FM (as she then was) and is

applicable here: “There is nothing in the circumstances of this case to establish that the Tribunal's discretion to make a decision on the review without taking any further action to allow or enable the applicant to appear before it miscarried in a manner constituting jurisdictional error (see generally the principles in *SZJQP v Minister for Immigration & Citizenship* [2007] FCA 1613 in relation to the exercise of the discretion under s 426A of the Act)” (which is the equivalent provision in relation to the Refugee Review Tribunal).

17. The Court finds the oral submissions made by the Applicant at the hearing do not establish any jurisdictional error committed by the Tribunal.

History

18. The Applicant is a citizen of India. He arrived in Australia on 11 November 2007 as the holder of an Independent ELICOS Sector (Temporary) Subclass 570 visa, which remained valid until 19 November 2008. His last substantive visa expired in November 2008.
19. On 13 November 2008, the Applicant applied for a Student (Temporary) (Class TU) Subclass 572 visa which was refused by a delegate of the First Respondent on 10 December 2008. The Applicant subsequently applied to the Tribunal for review of the Student (Temporary) (Class TU) Subclass 572 visa decision, but later withdrew that application for review.
20. On 16 November 2009, the Applicant and Ms Simone Tacke, a New Zealand citizen, met for the first time. On 21 October 2010, they married. They commenced to live together a few months before their wedding. On 26 October 2010, the Applicant applied for a Partner (Temporary) (Class UK) Subclass 820 visa or a Partner Residence (Class BS) Subclass 801 visa. He withdrew his application for review of the Student (Temporary) (Class TU) Subclass 572 visa decision on that same date. Ms Tacke was his visa sponsor. Ms Tacke has four children from a prior relationship.
21. On 11 November 2011, the delegate refused to grant the visa and on 11 December 2011, the Applicant applied for review to the Tribunal of the delegate's decision to refuse to grant the visa. On 11 April 2013, the

Tribunal affirmed the decision not to grant the Applicant a Partner (Temporary) (Class UK) Subclass 820 visa or a Partner Residence (Class BS) Subclass 801 visa.

Relevant Law And Tribunal Decision

22. There is a two stage process for partner visas. The Applicant must hold a provisional visa in order to be granted a permanent visa. The grant of the provisional visa enables an applicant to remain in Australia on a temporary basis. The grant of a permanent visa may subsequently be considered and would generally depend on whether the relationship has continued for a period of at least two years.
23. The Partner (Temporary) (Class UK) Subclass 820 visa allows a person to live in Australia if they are the spouse or de facto partner of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen. The criteria for a Partner (Temporary) (Class UK) Subclass 820 visa is set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) ('the Regulations'), Clause 820.21 of the Regulations provides for the criteria to be satisfied at the time of the application. Clause 820.21(1) of the Regulations requires that the Applicant not be the holder of a (Transit) Subclass 771 visa and that the Applicant meets the requirements of any of cl.820.21(2) to (9) of the Regulations (cl. 820.21(1) of the Regulations).
24. The Tribunal determined that only cl.820.221(2) of the Regulations was relevant to the Applicant's circumstances. That subclause required that at the time of application, the Applicant be the spouse or de facto partner of an Australian citizen, Australian permanent resident or eligible New Zealand citizen who was not prohibited by cl.820.21(2B) of the Regulations from being a sponsoring partner.
25. In the case of the Applicant, who was not the holder of a substantive visa at the time of application, he was required to meet certain criteria in Schedule 3 of the Regulations. With limited exceptions, the Applicant was required to satisfy the criteria set out in cls.3001, 3003 and 3004 of Schedule 3 of the Regulations, unless the Minister was satisfied that there were compelling reasons for not applying those criteria (cl.820.21(2)(d) of the Regulations).

26. Clause 3001 of Schedule 3 of the Regulations requires the application for the visa to be validly made within 28 days of the relevant day, as defined in cl.3001(2) of Schedule 3 of the Regulations. Relevantly, in this case, that meant the last day the Applicant last held a substantive visa which was determined by the Tribunal to be 13 November 2008, the day on which a bridging visa was granted to the Applicant. The application for a partner Partner (Temporary) (Class UK) Subclass 820 visa or a Partner Residence (Class BS) Subclass 801 visa was made on 26 October 2010, and thus the Tribunal found that the application was not made within 28 days of the relevant day, and accordingly, the Applicant did not satisfy cl.3001 of Schedule 3 of the Regulations.
27. Having regard to the finding that cl.3001 of Schedule 3 of the Regulations was not met, the Tribunal determined it was not necessary for it to reach conclusions and make findings on whether the Applicant satisfied cl.3004 of Schedule 3 of the Regulations (Criterion 3003 was not relevant in this case).
28. The Department of Immigration and Citizenship (as it then was) ('the Department') had written to the Applicant to explain that as he had not held a substantive visa at the time of the application, he needed to satisfy the criteria set out in cls.3001, 3003 and 3004 of Schedule 3 of the Regulations, unless there were compelling reasons for not applying these criteria. The Applicant was invited to provide information on this matter. In a letter to the Department dated 28 September 2011, the Applicant's then-representative stated that as a newly married couple, the parties would like to live together and asked that the application of the Schedule 3 of the Regulations criteria be waived. No further information was provided to the Tribunal and the Applicant did not take up the opportunity to attend a hearing about the issues arising in his case.
29. As the Tribunal found that the Applicant did not meet the relevant Schedule 3 of the Regulations criteria, it was required to consider whether, at the time of application, that was, 26 October 2010, there were compelling reasons for not applying the criteria. The Tribunal was guided by the policy guidelines as set out in the Department's Procedure Advice Manual ('PAM3') by reference to the Explanatory Statement to Statutory Rule No. 75 of 1996 ('the Explanatory

Statement’), which introduced the waiver provision to the Schedule 3 of the Regulations requirements in cl.820.211(2)(d) of Schedule 3 of the Regulations, and the Tribunal also considered the examples given in the PAM3 policy guidelines which were additional to the kinds of matters already considered by it in its Decision Record dated 11 April 2013 (‘Decision Record’) and which may constitute compelling reasons, but it did not consider that they applied to the circumstances of this case.

30. The Tribunal considered that the Applicant was assisted in relation to the visa application by a registered migration agent not being the same as the representative nominated for the review. The visa application showed that the Applicant and the sponsor met on 16 October 2009 at a friend’s house, and began a relationship about a month later. They were not living together at the time of the application because they were “applying for a bigger house”.
31. They married on 21 October 2010. Statements about the development of the relationship were submitted, and both parties wrote of the importance of the relationship to them. The file of the Department included a statutory declaration by the Applicant’s cousin, Mr Singh, who stated the sponsor was his wife’s best friend, and that he believed the Applicant and sponsor to be in a genuine and continuing relationship. There was also a statutory declaration from his wife, Mrs Julia Sidhu, who stated similarly.
32. In its Decision Record, the Tribunal stated that (at paragraph 30):-

“The only reason apparent in the material before it is that the couple wish to live together because they are married.”

33. In terms of its statutory task, to determine whether there were “compelling reasons” for not applying the Schedule 3 of the Regulations criteria, the Tribunal stated that a genuine relationship could not, in the absence of compelling reasons, be sufficiently compelling of itself to justify not applying the Schedule 3 of the Regulations criteria. The Tribunal noted that, by the time the visa application was lodged on 26 October 2010, the Applicant and Ms Tacke had been in a relationship for less than a year, short of the two-year relationship which is the example given in the Explanatory

Statement and the PAM3 policy guidelines, which may justify not applying the Schedule 3 of the Regulations criteria. Further, the Tribunal noted that there was no evidence that the Applicant and Ms Tacke had any children from their relationship, and noted that none of the other examples of compelling reasons given in the PAM3 policy guidelines appeared to apply to the circumstances of this case.

34. Accordingly, the Tribunal was not satisfied that there was evidence before it that there were compelling reasons for not applying the Schedule 3 of the Regulations criteria for the purposes of cl.820.211(2)(d)(ii) of Schedule 2 of the Regulations. Therefore, the Tribunal found the Applicant did not meet cl.820.211(2)(d)(ii) of Schedule 2 of the Regulations and therefore did not meet 820.211(2)(d) of Schedule 2 of the Regulations. Accordingly, the Tribunal found the Applicant could not be granted a Partner (Temporary) (Class UK) Subclass 820 visa. The Applicant was also unable to be the holder of a Partner Residence (Class BS) Subclass 801 visa because this subclass required the Applicant to be the holder of a Partner (Temporary) (Class UK) Subclass 820 visa. The Tribunal thus affirmed the decision not to grant a Partner (Temporary) (Class UK) Subclass 820 visa or a Partner Residence (Class BS) Subclass 801 visa.

Consideration

35. The Tribunal correctly identified the law with respect to the criteria for the grant of a visa and applied the criteria in a manner that was open to it, given the factual evidence before it. The Tribunal's decision was not unreasonable, illogical or irrational (*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611).
36. In *MZYPZ v Minister for Immigration and Citizenship* [2012] FCA 478, Bromberg J relevantly stated at paragraphs 10 to 13:-

“[10] [Clause 820.211(2)(d)(ii) addresses] whether there exists a sufficient basis to move the decision-maker to waive what would otherwise be criteria which an applicant for a visa must satisfy. In that context, “compelling reasons” means reasons which are sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria: Paduano v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 211 at [39] (Crennan J). The circumstances must be

sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: Babicci v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 77 at [24] (Tamberlin, Conti and Jacobson JJ).

[11] As Whitlam J said in McNamara v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1096 at [10]

“Reasons for not applying the Sch 3 criteria may appear compelling to one person and not to another. The adjective “compelling” does not introduce an objective standard. The waiver decision will always involve a subjective judgment.”

[12] In the evaluative judgment to be made, the decision-maker may consider a single circumstance or a multitude of circumstances. Ultimately, the question is whether the circumstances as a whole compel the decision-maker to exercise the discretion conferred.

[13] The decision-maker needs to be “satisfied” that compelling reasons exist.”

37. As submitted by Counsel for the First Respondent the Tribunal identified the correct interpretation for the words “compelling reasons”. The Tribunal had regard to policy guidelines as set out in the PAM3 guidelines and did not make findings having regard to government policy on an inflexible basis (*Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634).
38. As further submitted by Counsel for the First Respondent the Tribunal actively turned its consideration as to whether compelling reasons existed for the waiver of the Schedule 3 of the Regulations criteria on the basis of all the material before it. It was satisfied that there were no such compelling reasons. The process of reasoning of the Tribunal is evident in the decision itself. No error attends the decision.
39. Accordingly, this application shall be dismissed and costs follow the event.

I certify that the preceding thirty-eight (38) paragraphs are a true copy of the reasons for judgment of Judge Hartnett

Associate:

Date: 27 February 2014